IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KIM WAYNE KADER,
Appellant.

No. 2 CA-CR 2012-0450
Filed November 5, 2013

Appeal from the Superior Court in Pima County
No. CR20102315001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
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Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

M I L L E R, Judge:

¶1 Kim Kader was convicted after a jury trial of furnishing harmful items to a minor, seven counts of sexual conduct with a minor less than fifteen years of age, two counts of molestation of a child, kidnapping, and luring a minor for sexual exploitation. Kader appeals from his convictions and sentences and claims the trial court erred with respect to certain evidentiary rulings. He also contends there was prosecutorial misconduct, there was insufficient evidence to sustain his convictions on several counts, and that two of his life sentences were illegal. We affirm his convictions and sentences on all counts but two and four. For the reasons set forth below, we vacate his life sentences on counts two and four and remand for resentencing. We also vacate the criminal restitution order.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In June 2010, S.B., a twelve-year-old boy, came to Tucson for a multi-day visit with Kader at the apartment he shared with his roommate C.N.; both were friends of S.B.'s family. Kader engaged in various acts of sexual conduct with S.B. Upon returning home, S.B. told his family what had occurred, and the police were notified.

¶3 Kader was charged as indicated and convicted of all counts. The trial court imposed seven consecutive life sentences, to follow sentences on the other counts, which were concurrent with each other, the longest being seventeen years. Kader timely appealed his convictions and sentences.

Discussion

Expert Witness Testimony

¶4 Kader first argues the trial court erred in permitting a state's expert witness to testify, over his objection, about the long-term effects sexual abuse may have on victims. Kader contends the expert witness's testimony was irrelevant and speculative. We review the admissibility of expert testimony for an abuse of discretion. *State v. Salazar-Mercado*, 232 Ariz. 256, ¶ 4, 304 P.3d 543, 546 (App. 2013).

¶5 "A fundamental requirement for admission of any evidence is that it be relevant." *State v. Fisher*, 141 Ariz. 227, 245, 686 P.2d 750, 768 (1984); Ariz. R. Evid. 402 ("Irrelevant evidence is not admissible."). Where evidence "has any tendency to make a fact more or less probable" and "the fact is of consequence in determining the action," it is relevant. Ariz. R. Evid. 401.

¶6 Wendy Dutton, a forensic interviewer, testified for the state as an expert on the behavior and characteristics of child sexual abuse victims. On direct examination, Dutton stated that children who experience sexual arousal during the course of abuse are more likely to show trauma symptoms. Dutton was then asked what effect the "experienced arousal or orgasm" during sexual abuse would have on the victim. Kader objected to the question, contending that the effect of arousal during sexual abuse on the victim was speculative, irrelevant, and lacked foundation. Kader's objection was overruled, and Dutton testified that, based on her training, experience, and available literature, children who experience arousal or orgasm during sexual abuse may "feel as though they're responsible for the abuse happening" and that this experience can "impair their sexual response later in life and impair

their intimate attachments with others." Kader again objected on the grounds that Dutton's testimony was "basically trying to instill some kind of pity . . . or sympathy for what may potentially happen." The trial court overruled Kader's objection, and Dutton continued her testimony, explaining that sexual abuse can lead to issues with acting out and aggressive sexual behavior.

¶7 Kader contends Dutton's testimony about the possibility that S.B. may have problems with intimate relationships or problems with sexual aggression in the future was irrelevant and had "no tendency to make it more or less likely that he was molested or had sexual contact" with Kader. We agree. In this case, Dutton's testimony was not relevant to a fact of consequence in determining whether Kader had molested or sexually abused S.B. Ariz. R. Evid. 401. Therefore, the evidence was inadmissible. Ariz. R. Evid. 402.

¶8 Having made this determination, we next examine whether the trial court's admission of this evidence was harmless. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). "Error is harmless if it can be shown beyond a reasonable doubt that the error did not affect the verdict." *State v. Jones*, 185 Ariz. 471, 486, 917 P.2d 200, 215 (1996). Kader argues the admission of Dutton's testimony was not harmless error because it appealed to the sympathy of the jury and the central issue in the trial was S.B.'s credibility. When assessed in the context of all the evidence presented at trial, however, the irrelevant portions of Dutton's testimony constituted harmless error.

¶9 Dutton testified as a "blind" or "cold" expert and plainly stated she did not "know any of the facts of the case" to guard against "purposefully or inadvertently tailor[ing] [her] testimony to fit the facts of the case." Dutton's statements with respect to possible long-term effects of child sexual abuse on victims were presented in generalized, clinical terms and dealt with a wide range of mere possibilities. In addition, although S.B.'s credibility was at issue during the trial, Dutton's testimony was not improper opinion testimony on the "accuracy, reliability or credibility" of S.B.'s testimony. *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986) (expert testimony on behavioral characteristics affecting

credibility allowed, but not opinion of accuracy, reliability, or credibility of particular witness). Rather, Dutton testified about the general behavioral characteristics of child sexual abuse victims.

¶10 The jury was presented with other evidence upon which it could assess S.B.'s credibility. S.B. provided lengthy and detailed testimony, the credibility of which the jury could determine for itself. The jury also had physical evidence with which to evaluate S.B.'s credibility, including transparent tape and pornographic magazines found in Kader's room, both of which corroborated S.B.'s testimony describing separate incidents of sexual conduct. In addition, S.B's DNA[1] was found on a personal massager belonging to Kader. The trial court also properly instructed the jurors that they were not bound by any expert opinion and should give an opinion only the weight they believed it deserved. We presume they followed this instruction. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶11 Therefore, although Dutton's testimony about possible long-term effects of child sexual abuse victims had no relevance on the issue of whether Kader had committed the charged offenses, we conclude, in the context of all the evidence presented at trial, that it was harmless beyond a reasonable doubt. *See State v. Ring*, 204 Ariz. 534, ¶ 45, 65 P.3d 915, 933 (2003) (noting trial error "'quantitatively assessed in the context of other evidence presented'" to determine if harmless beyond a reasonable doubt), *quoting Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991); *State v. McKinley*, 157 Ariz. 135, 137-38, 755 P.2d 440, 442-43 (App. 1988) (expert testimony concerning general characteristics of child molest victims harmless error considering other evidence of defendant's guilt and corroboration of victim's story).

[1]Deoxyribonucleic acid.

Testimony About Kader's Alleged Medical Issues

¶12 Kader next argues the trial court erred in admitting his roommate's testimony about Kader's perceived medical ailments. He contends the evidence was inadmissible because it was privileged information disclosed pursuant to Rule 11.7, Ariz. R. Crim. P. We interpret criminal procedure rules de novo and first look to the plain language of a rule as "'the best and most reliable index of [the rule's] meaning.'" *State ex rel. Thomas v. Newell*, 221 Ariz. 112, ¶ 7, 210 P.3d 1283, 1285 (App. 2009), *quoting State v. Hansen*, 215 Ariz. 287, ¶ 7, 160 P.3d 166, 168 (2007). In addition, "[w]hether an evidentiary privilege exists is a question of law that we review de novo." *State v. Archibeque*, 223 Ariz. 231, ¶ 5, 221 P.3d 1045, 1048 (App. 2009).

¶13 A defendant's statement during a Rule 11.5, Ariz. R. Crim. P., competency hearing is privileged and inadmissible during trial. Ariz. R. Crim. P. 11.7. Rule 11.7(b)(1) specifically provides:

> No statement of the defendant obtained under these provisions, or evidence resulting therefrom, concerning the events which form the basis of the charges against the defendant shall be admissible at the trial of guilt or innocence, or at any subsequent proceeding to determine guilt or innocence, without his or her consent.

¶14 Rule 11.7(b)(1) codifies the holding that it is fundamentally unfair for a court to compel a psychiatric examination and then to allow the court-appointed psychiatrist to relay a defendant's incriminating statements to the jury. *State v. Tallabas*, 155 Ariz. 321, 323, 746 P.2d 491, 493 (App. 1987); *see also State v. Evans*, 104 Ariz. 434, 436, 454 P.2d 976, 978 (1969) (permitting court-appointed psychiatrist to transmit defendant's incriminating statements to jury fundamentally unfair). "The rule is grounded in the fifth amendment to the United States Constitution; fifth amendment rights are violated where such statements are introduced at trial to prove the guilt . . . of a criminal defendant who

neither initiated psychiatric evaluation nor attempted to introduce psychiatric evidence of his own." *Tallabas*, 155 Ariz. at 323, 746 P.2d at 493.

¶15 At the contested competency hearing, three doctors testified their examination of Kader revealed a delusional disorder that caused him to believe he had cancer throughout his body. Kader told each doctor that he believed he would die as a result of his medical ailments in the very near future.

¶16 At trial, the state called Kader's roommate, C.N., to testify about his observations of the events that weekend. On cross-examination, C.N. was asked about Kader's reported impotence. During redirect examination, the state asked C.N. whether Kader had ever told him "anything about any of [Kader's] other medical conditions." Kader objected to the relevance and asserted that the state could not use anything that had been addressed during the competency hearing. The trial court overruled the objection, noting that the jury was entitled to know that Kader claimed to have numerous ailments, including impotency, and that the jury could "presumably make a determination about whether it's embellished or that kind of thing." C.N. then testified that Kader complained of cancer but had apparently not sought medical attention for it.

¶17 Kader concedes C.N. had independent knowledge of Kader's medical complaints but, because "the prosecutor only knew of the evidence because of the proceedings," Kader contends such testimony was evidence that resulted from the competency hearing and therefore was not admissible. We disagree. Rule 11.7(b)(1) prohibits the admission of a defendant's statement obtained under the provisions of the rule, or evidence resulting therefrom, when it concerns the events which form the basis of the charges against the defendant. Although it is unclear whether the prosecutor learned about Kader's medical complaints independent of his consultation with C.N., there is no question that C.N.'s testimony did not originate from the competency proceedings or concern "the events which form the basis of the charges against [Kader]." *See* Ariz. R. Crim. P. 11.7(b)(1); *see also State v. Mauro*, 149 Ariz. 24, 34, 716 P.2d 393, 403 (1986) (holding that defendant's statement during Rule 11

evaluation that he "felt like a sitting duck" was not statement concerning the events which formed the basis of the charges against him), *rev'd on other grounds*, 481 U.S. 520 (1987). In any event, the testimony about Kader's alleged medical issues came from C.N.'s independent knowledge and was not prohibited under Rule 11.7(b)(1). *See Tallabas*, 155 Ariz. at 326, 746 P.2d at 496 (although defendant waived Rule 11.7(b)(1) privilege by voluntarily calling examining physician, evidence also properly admitted to jury from source independent of examining physician).

Sufficiency of the Evidence

¶18 Kader contends there was insufficient evidence to support several of his convictions. In reviewing the sufficiency of the evidence, we view the facts in the light most favorable to upholding Kader's convictions and resolve all reasonable inferences against him. *See State v. George*, 206 Ariz. 436, ¶ 3, 79 P.3d 1050, 1054 (App. 2003). "We will not disturb a defendant's conviction unless there is a complete absence of probative facts to support the verdict, and unless rational jurors could not have found the defendant guilty beyond a reasonable doubt." *Id.* (citation omitted); *see also State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) ("To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury.").

Convictions for Two Molestation Counts

¶19 Kader was charged with two counts of molestation of a child. Counts five and nine both specify the conduct as "touching victim's penis in shower," but alleged different dates. Count five alleged that Kader had touched S.B.'s genitals in the shower on or about June 8, 2010, the same date that Kader masturbated S.B. with a massager as alleged in count four. Count nine alleged Kader had touched S.B.'s genitals in the shower on or about June 9, 2010, the same date that Kader hog-tied S.B. and inserted his penis into S.B.'s anus as alleged in count eight. Count ten alleged Kader had forced S.B. to insert his penis into Kader's anus on or about June 10, 2010. Kader argues that there is evidence sufficient to support only one of

his convictions for molestation, asserting there was only evidence of one act of touching S.B.'s penis in the shower. On direct examination, S.B. testified that, in his statement to a detective, he had said that Kader took a shower with him, washed him, and touched his penis, immediately following the incident in which Kader had tied him up and inserted his penis into S.B.'s anus. During redirect examination, S.B. testified about a second occasion when Kader had touched his genitals in the shower, which followed sexual conduct as alleged in count ten:

> Q. Okay. What were you telling the detective that happened that next day?
>
> A. I don't remember.
>
> Q. Okay. If you look at line 37 on 16, does the detective – the detective just asked you and then what happened next, right?
>
> A. Yeah.
>
> Q. And you told him, "He made – he got me cereal, we watched TV, he made me eat – made me thaw out again, and then after lunch, or at least I think it was after lunch, the whole thing with him sitting on my crotch and poop all over it, took a shower with him, washing my crotch thoroughly." Do I have that right?
>
> A. Yes.
>
> Q. Okay. So that was the next day after being tied up. Do I have that right?
>
> A. Yeah.

¶20 Kader concedes the evidence presented at trial is sufficient to prove count nine, molestation of a child, alleged to have

occurred on or about June 9, 2010, the same date as the hog-tying incident, but argues there was insufficient evidence to support count five, molestation of a child, alleged to have occurred on or about June 8, 2010, the same date that Kader used the massager on S.B. Indirect testimony about when the two molestation offenses occurred did not exactly match the dates alleged in the indictment, but evidence at trial did establish that Kader had molested S.B. on two different days by touching S.B.'s genitals in the shower.

¶21 A technical or formal defect in an indictment may be remedied by amendment. Ariz. R. Crim. P. 13.5(b) ("charge may be amended only to correct mistakes of fact or remedy formal or technical defects"). "A defect is technical or formal if it does not change the nature of the offense charged or prejudice the defendant in any way." *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). An error concerning the date of the offense alleged in the indictment may be remedied by amendment because such an amendment does not change the nature of the offense. *Id.*; *see also State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). "When the amendment results in no change in the underlying offense or actual prejudice to the defendant, the indictment is automatically deemed to conform to the evidence adduced at trial." *Jones*, 188 Ariz. at 544, 937 P.2d at 1192; *see also* Ariz. R. Crim. P. 13.5(b) ("The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.").

¶22 Kader has not alleged nor can he establish that amending the indictment to conform to the evidence adduced at trial prejudiced him or changed the underlying offense. Kader did not offer an alibi, and his only defense at trial was that the acts did not occur. Thus, the jury was left to decide the sole issue of credibility. The verdict here shows that the jury did not believe the only defense offered. *See State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App. 1990) (jury's verdict of guilt indicated they did not believe his credibility defense, the only defense offered). Therefore, under the circumstances of this case, we conclude Kader was not prejudiced by any amendment to the indictment. *See Jones*, 188 Ariz. at 544, 937 P.2d at 1192 (any defect in dates alleged in indictment

could not have prejudiced defendant where sole defense was victim lied). Accordingly, the indictment is deemed amended to conform to the evidence, which established that two molestations occurred on two separate dates in June 2010.

¶23 From the evidence presented at trial, rational jurors could conclude that Kader had touched S.B. in the shower on at least two separate occasions. Thus, S.B.'s testimony regarding the dates of the molestations was sufficient to support defendant's convictions. *See id,* (victim's testimony regarding dates of sexual assaults sufficient to support defendant's conviction).

Conviction for Luring

¶24 Kader next argues there was insufficient evidence to support his conviction for luring a minor for sexual exploitation because nothing Kader said to S.B. could be construed as luring or an offer of sexual conduct and there was no evidence of Kader producing and distributing child pornography. Section 13-3554(A), A.R.S., provides: "A person commits luring a minor for sexual exploitation by offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor."

¶25 In addressing sufficiency of the evidence for an offense of luring, "the proper inquiry is whether substantial evidence exists for a jury to reasonably and fairly conclude that the defendant in fact solicited or offered to engage in sexual conduct with a minor." *State v. Yegan*, 223 Ariz. 213, ¶ 28, 221 P.3d 1027, 1034 (App. 2009); *see also Grohs v. State*, 944 So. 2d 450, 457 (Fla. Dist. Ct. App. 2006) (affirming conviction for luring of a minor because jury could reasonably infer online chat room communications met ordinary definitions of seduce, solicit, lure, and entice, even though defendant had avoided explicit references to sexual conduct). Jurors are expected to utilize their varied life experiences "to evaluate the conversation as a whole and decide whether particular words and phrases can reasonably be interpreted as offering or soliciting sexual conduct with a minor." *Yegan*, 223 Ariz. 213, ¶ 28, 221 P.3d at 1034; *see also Grohs*, 944 So. 2d at 457 (noting that tenor of defendant's suggestive comments such as

"we can be more, and do whatever makes you happy" and "I'd be happy to do anything with and/or for you right now," considered in the context of being directed at a fifteen-year-old boy in a "Young Men" chat room, could be reasonably construed as propositioning of sexual conduct).

¶26 Kader argues there was no evidence that he said anything to S.B. that could be construed as luring or an offer of sexual conduct. His argument, however, is contradicted by the evidence presented at trial. S.B. told a detective Kader had stated that he could not "play with" himself until he had "played with" Kader and had "got him all hard and got him to orgasm." Following this exchange, Kader tied up S.B. and made S.B. perform oral sex on him. Moreover, during a previous encounter, Kader had S.B. take off his clothes, lie on Kader's bed, and look at pornographic magazines while he told S.B. "things about orgasms and girls[']orgasms." A jury could conclude from this evidence that Kader had solicited oral sex from S.B., thereby committing luring of a minor. *See State v. Hollenback*, 212 Ariz. 12, ¶ 8, 126 P.3d 159, 162 (App. 2005) (victim testimony defendant had repeatedly asked him to participate in oral sex constituted substantial evidence to support luring conviction).

¶27 Kader further argues there is insufficient evidence to support his conviction for luring because the statute requires the minor be lured for sexual exploitation as defined in A.R.S. § 13-3553(A), which defines sexual exploitation in terms of producing and distributing child pornography,[2] and there was no evidence presented at trial to establish that here.

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[2]Section 13-3553(A) provides:

> A person commits sexual exploitation of a minor by knowingly:
>
> 1. Recording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged

¶28 As Kader acknowledges, we have already rejected this exact argument. In *Hollenback*, we concluded that § 13-3554 "expressly prohibits requesting sexual conduct with a minor" and that the statute does not incorporate or refer to the provisions of § 13-3553, "nor does it require that the offering or soliciting occur for the purpose of violating those provisions." 212 Ariz. 12, ¶ 5, 126 P.3d at 161. Kader asserts that *Hollenback* was wrongly decided and that § 13-3554 must be interpreted to be consistent with other statutes. We disagree and decline to overrule our holding. Kader's solicitation that S.B. could not "play with" himself until he had "played with" Kader constitutes substantial evidence to support his conviction for luring under § 13-3554. *See Hollenback*, 212 Ariz. 12, ¶ 8, 126 P.3d at 162.

Alleged Prosecutorial Misconduct

¶29 Kader next argues the trial court erred in denying his motion for a mistrial based on alleged prosecutorial misconduct during closing argument. Kader asserts the prosecutor implicitly referred to his invocation of his right to remain silent after his arrest and referred to facts not in evidence. We review a court's denial of a mistrial for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 124, 94 P.3d 1119, 1151 (2004).

¶30 Prosecutors are afforded wide latitude in presenting closing arguments to the jury. *State v. Jones*, 197 Ariz. 290, ¶ 37,

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in exploitative exhibition or sexual conduct.

2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitative exhibition or other sexual conduct.

4 P.3d 345, 360 (2000). "This is because closing arguments are not evidentiary in nature; at such arguments counsel are permitted to comment on the evidence already introduced and to argue reasonable inferences therefrom." *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970). However, a prosecutor may not comment at trial, including during closing argument, on a defendant's invocation of his Fifth Amendment rights. *State v. Parker*, 231 Ariz. 391, ¶ 64, 296 P.3d 54, 69 (2013).

¶31 During closing argument, the prosecutor stated that Kader had received "every piece of evidence" the state wanted to use at trial and had been able "to sit and think" about how to explain what S.B. said he had done as well as the items found in his room after his arrest. Kader moved for a mistrial based on prosecutorial misconduct, on the grounds that the prosecutor's comments amounted to a comment on Kader's right to remain silent. The trial court denied the motion, finding no prosecutorial misconduct.

¶32 Here, the prosecutor's reference to Kader's ability "to sit and think" about how to explain the state's evidence was not a comment on Kader's invocation of his right to remain silent. The prosecutor's comment did not refer to Kader's conduct during the police investigation, nor did it mention Kader being questioned by police, much less refer to whether he had been read or had invoked his rights. Accordingly, the prosecutor's comments were not improper and did not constitute prosecutorial misconduct. *See State v. Siddle*, 202 Ariz. 512, ¶ 5, 47 P.3d 1150, 1153 (App. 2002) (holding that introduction of evidence that defendant did not make particular statements to police "did not state or imply that [defendant] had invoked his right to remain silent" and was therefore not improper).

¶33 Kader further contends the prosecutor committed misconduct by referring to facts not in evidence when he mentioned that Kader had all the state's evidence for two years. Because he raises this argument for the first time on appeal, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶34 Kader testified at trial, which began on August 21, 2012, that he had been arrested on June 24, 2010, and that he had seen "all the disclosure." The prosecutor's comment was therefore a reasonable inference from the facts that Kader had been arrested more than two years before trial and had reviewed the state's evidence disclosed to him. Thus, it was not improper. Even assuming, arguendo, that the prosecutor's reference to Kader having had all the disclosure for two years was improper, Kader has failed to establish how such commentary prejudiced him. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (to prevail under fundamental error review, defendant must establish fundamental error exists and caused him prejudice).

¶35 The trial court did not err in denying Kader's motion for a mistrial.

Illegal Sentences

¶36 Kader argues, and the state concedes, that the life sentences on two of his convictions for sexual conduct with a minor are illegal. An illegal sentence constitutes fundamental, reversible error. *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013).

¶37 Kader was found guilty of counts two and four of the indictment, which charged that Kader had masturbated S.B.'s penis with his hand and a massager, respectively. The jury also found that S.B. was twelve years of age or younger. The trial court sentenced Kader to life imprisonment with respect to counts two and four, pursuant to A.R.S. § 13-705(A).

¶38 Section 13-705(A) mandates a term of life imprisonment for adults convicted of sexual conduct with a minor who is twelve years of age or younger; however, this subsection "does not apply to masturbatory conduct." We therefore vacate Kader's life sentences for counts two and four and remand for resentencing on those two counts only.

¶39 We also note that the sentencing minute entry erroneously states Kader is eligible for parole on all his life

sentences, including counts two and four, after twenty-five years. Kader, however, is not eligible for release on any basis for thirty-five years, pursuant to A.R.S. § 13-705(A).[3] The sentencing minute entry shall be amended to reflect the release eligibility under § 13-705(A) for Kader's remaining five life sentences for sexual conduct with a minor.

Criminal Restitution Order

¶40 Although Kader has not raised the issue on appeal, we find fundamental error associated with the criminal restitution order (CRO). *See* A.R.S. § 13-805.[4] In the sentencing minute entry, the trial court ordered that "the attorney fees and any restitution ordered by the Court in the case shall be reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Kader] is in the Department of Corrections." The trial court's imposition of the CRO before the expiration of Kader's sentence "'constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.'" *Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d at 910, *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This remains true even though the court ordered that the imposition of interest be delayed until after Kader's release. *See id.* ¶ 5.

Disposition

¶41 For the foregoing reasons, we affirm Kader's convictions and his sentences on all counts but two and four. We

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[3] We note that during sentencing the trial court correctly tracked the statutory language in § 13-705(A), stating that Kader could not "get out until [he] [had] serve[d] at least thirty-five years" for each life sentence.

[4] Section 13-805 has been amended three times since the date of the crimes. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. We apply the version in effect at the time of the crimes. *See* 2005 Ariz. Sess. Laws. ch. 260, § 6; *Lopez*, 231 Ariz. 561, n.1, 298 P.3d at 910 n.1.

vacate the sentences imposed on counts two and four and, as noted above, remand for sentencing on those counts only. We also vacate the CRO.